STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judges Patrick M. Meter, Michael J. Talbot and Stephen L. Borrello

THE DETROIT EDISON COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

/

Supreme Court No. **125950**

Court of Appeals No. 237872

MPSC Case No. U-12134

MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION, and its distribution rural electric members, ALGER DELTA COOPERATIVE ELECTRIC ASSOCIATION, CHERRYLAND ELECTRIC COOPERATIVE, CLOVERLAND ELECTRIC COOPERATIVE, GREAT LAKES ENERGY COOPERATIVE, HOME WORKS TRI-COUNTY ELECTRIC COOPERATIVE, MIDWEST ENERGY COOPERATIVE, THE ONTONAGON COUNTY RURAL ELECTRIFICATION ASSOCIATION, PRESQUE ISLE ELECTRIC & GAS CO-OP and THUMB ELECTRIC COOPERATIVE,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

/

Supreme Court No. **125954**

Court of Appeals No. 237873

MPSC Case No. U-12134

CONSUMERS ENERGY COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

/

Supreme Court No. **125955**

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BRIEF ON APPEAL – APPELLEE
MICHIGAN PUBLIC SERVICE COMMISSION

ORAL ARGUMENT REQUESTED

MICHIGAN PUBLIC SERVICE COMMISSION

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Dated: February 7, 2005

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Statement of the Basis of Jurisdiction

Appellee Michigan Public Service Commission states the jurisdictional summaries presented in Appellants' briefs are complete and correct.

Question Presented for Review

On June 5, 2000 the Legislature enacted the Customer Choice and Electric Reliability Act, 2000 PA 141 (Act 141). Subsection 10a(4) of Act 141 directed the Michigan Public Service Commission (MPSC or Commission) to establish a Code of Conduct applicable to all electric utilities. The Legislature directed the Commission to establish the Code of Conduct by December 4, 2000. The Administrative Procedures Act excludes from its rulemaking requirements a "determination, decision or order in a contested case", MCL 24.207(f), and a "decision by an agency to exercise or not exercise a permissive statutory power," MCL 24.207(j). The Commission used a contested case proceeding to establish the Code of Conduct. Was the adoption of the Code of Conduct lawful?

Appellee MPSC answers: Yes.

Appellants Edison, MECA and Consumers answer: No.

The Court of Appeals answered: Yes.

Counter-Statement of Facts

I. Background Information

Since 1939, the Michigan Public Service Commission (MPSC or Commission) has been legislatively vested with the power and jurisdiction to regulate retail rates, rules and conditions of service for public utilities pursuant to the Public Service Commission Act (Act 3), 1939 PA 3, MCL 460.1 *et seq.*[1] Section 6 of Act 3, MCL 460.6, outlines the Commission's jurisdiction as follows:

> Sec. 6. **The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state** except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. **The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities.** The public service commission is further granted the power and jurisdiction **to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities,** including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipeline companies; motor carriers; and all public transportation and communication agencies other than railroads and railroad companies. [Emphasis added.]

Pursuant to Section 6a and 6h of Act 3, the Commission regulates electric utility rates and charges for power supply to retail customers. The Commission's authority to regulate the rates, terms and conditions of that service is additionally provided for in the Electric Transmission Act, 1909 PA 106, MCL 460.551 *et seq.*

On June 5, 2000, the Michigan Legislature amended Act 3 by enacting the Customer Choice and Electricity Reliability Act, 2000 PA 141 (hereinafter referred to as the Customer Choice Act or Act 141). See MCL 460.10 through MCL 460.10bb. The purposes of Act 141 are

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[1] Prior to 1939 retail rates of public utilities were set by the Michigan Public Utilities Commission, which was abolished by 1939 PA 3, § 1, MCL 460.1. The Michigan Public Utilities Commission was the successor to the Michigan Railroad Commission which regulated retail electric rates of public utilities prior to 1919.

stated in Section 10:

> (1) Sections 10 through 10bb shall be known and may be cited as the "customer choice and electricity reliability act".
>
> (2) The purpose of sections 10a through 10bb is to do all of the following:
>
> (a) To ensure that all retail customers in this state of electric power have a choice of electric suppliers.
>
> (b) To allow and encourage the Michigan public service commission to foster competition in this state in the provision of electric supply and maintain regulation of electric supply for customers who continue to choose supply from incumbent electric utilities.
>
> (c) To encourage the development and construction of merchant plants which will diversify the ownership of electric generation in this state.
>
> (d) To ensure that all persons in this state are afforded safe, reliable electric power at a reasonable rate.
>
> (e) To improve the opportunities for economic development in this state and to promote financially healthy and competitive utilities in this state.
>
> (3) Subsection (2) does not apply after December 31, 2003.
>
> [MCL 460.10.]

Act 141 expanded the existing powers of the Commission so as to authorize it to implement a framework "[t]o ensure that all retail customers in this state of electric power have a choice of electric suppliers." MCL 460.10(2)(a). The framework for providing choice is to encourage competition in the provision of electric power supply, while maintaining the traditional regulation of electric power supply for retail customers who continue to choose supply from their incumbent electric utilities. See Section 10(2)(b), MCL 460.10(2)(b).

Act 141's expansion of the Commission's powers, was, in large measure, the Legislature's response to this Court's decision that the Commission's earlier attempt to establish a competitive framework for electric suppliers was beyond the Commission's powers and jurisdiction. *Consumers Power Co v Public Service Comm,* 460 Mich 148; 596 NW2d 126

(1999). Act 141 remedies this lack of power and jurisdiction and vests the Commission with the power to implement a competitive framework for electric providers.

One of the problems of encouraging competition in the retail supply of electricity, while allowing incumbent electric utilities to maintain monopoly control over the distribution lines to end users, is to prevent the incumbent electric utility's control of its distribution system from giving itself an unfair advantage when competing in the supply market. This is particularly true when the State does not prohibit incumbent providers from selling electric supply through another entity or affiliate. Act 141 gives retail customers a choice of suppliers but also allows incumbent electric utilities to compete as a supplier, while maintaining a level playing field among the competitors. The method chosen by the Legislature to ensure a level playing field was to have the Commission establish a Code of Conduct, which is provided in subsection 10a(4) of Act 141 as follows:

> **Within 180 days after the effective date of the amendatory act that added this section, the commission shall establish a code of conduct that shall apply to all electric utilities.** The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10bb. [Emphasis added.]

It is that Code of Conduct, established by the Commission pursuant to subsection 10a(4), that is being challenged by the incumbent electric service providers in this case.

II. Administrative Proceedings Below

Prior to the enactment of Act 141, the Commission had initiated a proceeding relative to a code of conduct for Consumers Energy Company (CECo) and the Detroit Edison Company (Edison), Michigan's two largest electric utilities. That proceeding was docketed as MPSC Case No. U-12134. (Appellant's Appendix 047a-050a). That administrative proceeding was well on

its way to conclusion when Act 141 went into effect on June 5, 2000. In accordance with Act 141, § 10a(4)'s directive, the Commission immediately undertook a course of action to comply with Act 141's mandate. The Commission renoticed MPSC case U-12134 and adopted a new schedule in U-12134 to allow for the taking of additional evidence and testimony so that a Code of Conduct could be established within 180 days, as required by Act 141. (Appellant's Appendix 051a–053a). In keeping with the new schedule additional testimony was heard on August 22, 2000. The record in U-12134 consists of 848 pages of transcript and 30 exhibits. (Appellant's Appendix 058a).

Based on that record, the Commission issued its December 4, 2000 Order in MPSC Case U-12134, *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and the Detroit Edison Company,* in which it adopted a Code of Conduct as required by Act 141. (Appellant's Appendix p. 056a-081a).

Several parties filed for rehearing. Additionally, the three Appellants Michigan Electric Cooperative Association, *et al* (MECA), Edison and CECo together filed a Joint Request for Immediate Interim Relief, requesting an extension of the deadline for filing Code of Conduct Compliance Plans. The Joint Request also included a request for a stay. In an order dated January 23, 2001, the Commission extended the deadline for filing code of conduct compliance plan. *In the Matter of the Approval of a Code of Conduct for Consumers Energy Company and the Detroit Edison Company,* MPSC Case No. U-12134. (Appellant's Appendix pg. 082a-085a). In that January 23, 2001 order, the Commission held that, given the complex nature of the undertaking, a code of compliance plan would not be due until 60 days after the Order on Rehearing. *Id.*

On October 29, 2001, the Commission issued its Order on Rehearing. Attached to that order as Exhibit A was a 6-page Code of Conduct. *In the Matter of the Approval of a Code of*

Conduct for Consumers Energy Company and the Detroit Edison Company, MPSC Case No. U-12134 (Appellants' Appendix, pp. 089a-113a). A unique feature of the Commission's Code of Conduct is its waiver/exemption request procedure. In part this was due to the Legislature's requirement that a Code of Conduct be implemented within 180 days of the enactment of Act 141. In complying with this requirement, the Commission expressly recognized, in its October 29, 2001 Order on Rehearing, the possibility that the code, as adopted, could lead to unreasonable results when applied to specific activities:

> Several parties argue that various provisions of the code lead to unreasonable results when applied to specific activities. For example, MECA contends that the code should not apply to internet services and credit card operations because these only produce small amounts of revenue. Other examples include the obligations of contracts entered into before the effective date of the code, appliance service programs, smoke alarm sales, fiber optic networking services, forestry services, etc. The Commission is not prepared to rule on specific exemptions in a factual vacuum. The code permits electric utilities and alternative electric suppliers to request waivers from one or more provisions of the code upon a demonstration that the waiver will not inhibit the development or functioning of a competitive market. That provision is sufficient to ensure that the code will not be applied in situations where it produces unreasonable results. [MPSC Case No. U-12134, October 29, 2001 Order on Rehearing, pp 15-16.]

Accordingly, the Commission incorporated the following waiver/exemption request procedure into Part VI of its Code of Conduct:

> In the compliance filing, the electric utility or alternative electric supplier may request a waiver from one or more provisions of this code of conduct. The electric utility or alternative electric supplier carriers the burden of demonstrating that such a waiver will not inhibit the development or functioning of the competitive market. [MPSC Case No. U-12134, October 29, 2001 Order on Rehearing, Appellants' Appendix, p. 113a].

Because the Commission was unwilling to rule on such matters without the necessary facts, it provided the foregoing opportunity for affected utilities and others to seek waivers or exemptions from the Code of Conduct. Moreover, there was no limit placed either on the number of waivers that could be requested. Furthermore, because the Code of Conduct affords the affected utilities

and others the opportunity to file revisions as needed, there is likewise no limitation placed on when such waivers can be requested.

On November 20, 2001, MECA, Edison, and CECo each filed a claim of appeal of the Commission's orders in MPSC Case No. U-12134. Additionally, each filed a motion seeking to stay the Commission's orders pending appeal.

On December 4, 2001, the Court of Appeals ordered that the separately filed Claims of Appeal by Edison in Docket No. 237872, CECo in Docket No. 237873, and MECA in Docket No. 277874 be consolidated. On December 7, 2001, the MPSC filed its Brief in Opposition to the three Motions for Stay filed by Edison, CECo and MECA. Briefs in Opposition were also filed by MAFC, MPGA, and ABATE.

On December 14, 2001, the Court of Appeals issued an Order that denied each of the Motions to Stay filed by Appellants. In a published opinion released March 2, 2004, the Court of Appeals affirmed the Commission's decision.

Applications for Leave to Appeal were filed by Consumers Energy, Detroit Edison and the Michigan Electric Cooperative Association. On November 5, 2004 this Court granted the applications and directed the parties to brief only "whether the December, 2000 and October, 2001 orders of the Commission are unlawful because they were not promulgated in conformity with the rulemaking provisions of the Administrative Procedures Act, MCL 24.201 *et seq.*"

Counter-Statement of Standard of Review

The standard of review applicable to Commission orders is prescribed by MCL 462.26(8) (Section 26). In *In re MCI Telecommunications Complaint*, 460 Mich 396; 596 NW2d 164 (1999), this Court stated:

> Our standard of review of a decision of the PSC is provided by statute:
>
> In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of

> the commission complained of is unlawful or unreasonable. MCL 462.26(8). [460 Mich at 427.]

Thus, the broad issue under Section 26 is whether the Appellant has shown by clear and satisfactory evidence that the Commission's order is unlawful or unreasonable. Citing earlier decisions, this Court noted what must be shown by an appellant to overturn a Commission order:

> To declare an order of the commission unlawful there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment. [*Giaras v Public Service Comm*, 301 Mich 262, 269; 3 NW2d 268 (1942); *Id.* 460 Mich at 427.]

With respect to what must be shown by an appellant to establish that a Commission order is unreasonable, this Court added:

> The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or "zone" of reasonableness within which the PSC may operate. *Michigan Bell Telephone Co v Public Service Comm*, 332 Mich 7, 26-27; 50 NW2d 826 (1952). [*Id.* 460 Mich 427.]

The "zone" of reasonableness recognized by this Court is consistent with the longstanding principle of giving deference to decisions made by administrative agencies.

The principle of deference is supported by a long line of cases decided by federal and Michigan courts. See, *United States v Mayes*, 12 Wall 381; 20 L Ed 381 (1871); *Investment Company Institute v Camp*, 401 US 617, 626-627; 28 L Ed 2d 367; 91 S Ct 1091 (1971) ("[i]t is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."); *Breuhan v Plymouth-Canton Community Schools*, 426 Mich 278, 282-283; 389 NW2d 85 (1986); *Magreta v Ambassador Steel Co*, 380 Mich 513, 519; 158 NW2d 473 (1968). "This Court has repeatedly given great deference to the construction placed upon a statute by the agency legislatively chosen to enforce it."

Moreover, the *Magreta* precedent on which *Breuhan* relies leaves little doubt that

Michigan jurisprudence follows the approach taken by the federal courts, as this Court in *Magreta*, 380 Mich at 519, quoted with approval the U.S. Supreme Court's policy when reviewing agency determinations of statutes enforced by that agency:

> In *Boyer-Campbell Co. v. Fry* (1935), 271 Mich 282, 296, we quoted with approval the following language of the United States Supreme Court in *United States v. Moore* (1877), 95 US 760, 763, (24 L Ed 588, 589):
>
> > "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."

This principle of deference has been recognized in numerous other cases.[2]

Consistent with this Court's rulings, the Michigan Court of Appeals has also specifically held that judicial deference is to be given to the MPSC's construction of a statute which it enforces. In *Consumers Power Co v PSC No. 1*, 196 Mich App 436, 453; 493 NW2d 424 (1992), the Court in reviewing the MPSC's interpretation of Section 6j(13)(b) of 1982 PA 304, stated:

> Great deference is due the construction of a statute by the agency legislatively chosen to enforce it, which ought not to be overrued without cogent reasons. *Breuhan v Plymouth-Canton Community Schools*, 425 Mich 278, 282-283; 389 NW2d 85 (1986). We find the PSC's interpretation of Section 6j(13)(b) reasonable, and know of no cogent reasons to overrule it.

With regard to the degree of deference to be afforded to a statutory interpretation made by the MPSC, the Court of Appeals held in *Ameritech Michigan v MPSC, et al*, 239 Mich App 686, 689; 609 NW2d 854 (2000) that:

> As a general rule, we will defer to the construction placed on a statute by the government agency charged with interpreting it, unless the agency interpretation is clearly erroneous. An agency's initial interpretation of new legislation is not entitled to the same measure of deference as is a longstanding interpretation. However, merely establishing that another interpretation of a statute is plausible does not satisfy a party's burden of proving by clear and convincing evidence that

[2] *Adrian School Dist v MPSERS*, 458 Mich. 326, 336; 582 N.W.2d 767 (1998); *Empire Iron Mining Partnership v Orhanen*, 455 Mich. 410, 416; 565 N.W.2d 844 (1997); see *People ex rel Simmons v Anderson*, 198 Mich. 38, 47; 164 N.W. 481 (1917).

the PSC's interpretation is unlawful or unreasonable. *In re MCI Telecommunications Complaint*, 229 Mich App 664, 681-682; 583 NW2d 458 (1998), *aff'd in part and rev'd in part* 460 Mich 396; 596 NW2d 164 (1999).

This Court has identified one instance in which the principle of deference is not applicable. When the language of a statute is unambiguous, the plain language of the statute is controlling and no deference is afforded an agency's interpretation of the statute. *Ludington Service Corp. v Acting Comm'r of Ins.*, 444 Mich 481, 505; 511 NW 2d 661, *amended* 444 Mich 1240; 518 NW2d 478 (1994).

In this case, § 10a(4) of Act 141 clearly and unambiguously directs the MPSC to adopt a code of conduct, and to do so within a 180-day period. The statute, however, is silent as to the method by which the code of conduct was to be adopted. Consequently, the rule in *Ludington Service Corp., supra*, is not applicable in this case. The MPSC's decision to adopt the code of conduct through a contested case proceeding involved an appropriate exercise of the MPSC's duties, judgment, technical expertise and discretion.

The Code of Conduct adopted by the Commission is consistent with the Legislature's intent in enacting Act 141. It is based upon Act 141's stated purposes and the clear and unambiguous language that requires the MPSC to establish such a Code of Conduct. Appellants have failed to meet their burden of demonstrating that the order is unlawful because "the Commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion." See *Giaras v PSC*, 301 Mich 262, 269; 3 NW2d 268 (1942). The Commission's Orders establishing a Code of Conduct consistent with Section 10a(4) of Act 141 is also reasonable because it is based upon the substantial record evidence following the contested case proceedings below.

The MPSC's interpretation of Act 141 is entitled to deference, and was appropriately afforded deference by the Court of Appeals. The Court of Appeals correctly determined that the

Appellants failed to meet their statutory burden of showing by clear and satisfactory evidence that the MPSC's December, 2000 and October, 2001 orders are unlawful or unreasonable. The Court of Appeals decision should be affirmed.

Argument

I. The Commission's orders establishing the Code of Conduct, following a contested case proceeding, do not violate the APA.

A. The plain text of MCL 24.207(f) and case precedent interpreting that text establishes that an agency may develop policy by rule or order.

Numerous federal cases establish that an agency may develop policies by rule or order. The seminal cases in this regard are: *National Labor Relations Board v Bell Aerospace Co,* 416 US 267, 94 S Ct 1757, 40 L Ed 2d 134 (1974), and *Securities and Exchange Comm v Chenery,* 332 US 194; 67 S Ct 1575; 91 L Ed 2d 1995 (1947). In *SEC v Chenery, supra,* the Court rejected the claim that if the agency sought to promulgate a new standard that would govern future conduct, it could do so only through formal rule promulgation.

In *National Labor Relations Board v Bell Aerospace, supra,* the Supreme Court reiterated that an administrative agency is not precluded from announcing new principles in an adjudicative proceeding, and the choice between rulemaking and adjudication lies in the first instance within the agency's discretion. The Supreme Court relied on *SEC v Chenery, supra,* and *NLRB v Wyman-Gordon Company*, 394 US 759; 89 S Ct 1426; 22 L Ed 2d 709 (1969), that recognized that adjudicated cases may and do serve as vehicles for the formulation of agency policies, and that such cases "generally provide a guide to action that the agency may be expected to take in future cases." The Supreme Court then added:

> Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements.... It is true, of course, that rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course. But surely the Board has discretion to decide that the adjudicative procedures in this case may also produce

> the relevant information necessary to mature and fair consideration of the issues. Those most immediately affected, the buyers of the company in the particular case, are accorded a full opportunity to be heard before the Board makes its determination.

National Labor Relations Board v Bell Aerospace, supra, 416 US at 295. Thus, contrary to Appellants' position, the doctrine announced in *NLRB v Bell Aerospace* and *SEC v Chenery* did not limit an agency from developing principles or policies through orders even if they have prospective effect.

In Michigan, the federal approach of allowing administrative agencies to develop its principles or policies by rule or order has been followed. An administrative agency's authority to develop policies or standards by rule or by order is expressly recognized in the Michigan Administrative Procedures Act, MCL 24.201 *et seq.* (APA). The APA expressly excludes any "determination , decision or order in a contested case" from the definition of a rule. MCL 24.207(f). The language of the APA is clear and unambiguous. Determinations, decisions and orders issued by an administrative agency in contested case proceedings are not subject to the APA's rulemaking requirements. The language of § 7(f) of the APA should be enforced according to its plain text. As this Court stated in *Sun Valley Foods Co. v Ward*, 460 Mich 230, 236, 596 NW2d 119 (1999):

> If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted.

In *Northern Michigan Exploration Co v PSC*, 153 Mich App 635; 396 NW2d 487 (1986), the Court of Appeals held that standards may be set by the MPSC pursuant to the rulemaking provisions of the Administrative Procedures Act **or** through adjudication on a case-by-case basis. In *Northern Michigan Exploration* the plaintiff challenged the legality of the Commission's adoption of a 90-10 net pay proration formula as being an application of a policy that had not

been promulgated as a rule under Section 33 of the Administrative Procedures Act, MCL 24.233. The Court rejected this challenge, stating:

> **Our jurisdiction is limited to determining whether the commission acted within the power and authority delegated to it by the Legislature.** The Legislature has authorized the commission to prorate gas production on a just and equitable basis in the proportion that the total recoverable gas bares to the recoverable gas under each property. MCL 43.108; MSA 22.1318. The commission, through its rule-making authority (MCL 483.105; MSA 22.1315), has adopted a proration method that is equitable – a proration method that is generally recognized in the oil and gas industry.
>
> **The formula is upheld also on the further ground that the rule-making requirements of the APA does not apply to "[a] determination, decision or order in a contested case."** MCL 24.207(f); MSA 3.560(107)(f).
>
> Finally plaintiffs' contention must be rejected because it is settled that an agency has the option of setting standards either pursuant to the rule-making provisions of the APA or case by case through adjudication. See, for example, *American Way Life Ins Co. v Ins Comm'r,* 131 Mich App 1; 345 NW 2d 634 (1983), Iv den 419 Mich 937 (1984); *DAIIE v Comm'r of Ins,* 119 Mich App 113; 326 NW 2d 444 (1982); *Michigan Life Ins Co. v Ins Comm'r*, 120 Mich App 552; 328 NW2d 82 (1982). [*Northern Michigan Exploration, supra,* 153 Mich App at 649 (emphasis added).]

Additionally, in *American Way Life Ins v Ins Comm'r*, 131 Mich App 1, 5-7; 345 NW2d 634 (1983), citing *DAIIE v Comm'r of Ins*, 119 Mich App 113, 117-118; 326 NW2d 444 (1982), the Court of Appeals recognized the need for an administrative agency to have the flexibility to act either by rule or by order:

> [A]n administrative agency need not always promulgate rules to cover every conceivable situation before enforcing a statute. Specifically, an administrative agency may announce new principles through adjudicative proceedings in addition to rule-making proceedings. The United States Supreme Court stated in *Securities & Exchange Comm v Chenery Corp*, 332 US 194, 202; 67 S Ct 1575; 91 L Ed 1995 (1947):
>
> "Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity."

* * *

> Section 107 of the APA, MCL 24.207; MSA 3.560(107), provides that a rule is a "statement, standard, policy, ruling or instruction of general applicability". The APA definition of a rule expressly excludes any "order establishing or fixing rates", MCL 24.207(c); MSA 3.560(107)(c), and any "determination, decision or order in a contested case", MCL 24.207(f); MSA 3.560(107)(f). The commissioner's decision to disapprove a particular insurer's premium following a hearing as provided in § 15 of the Credit Insurance Act is not a ruling of general applicability and is not a rule within the meaning of the APA. The rate decision in a contested case is binding only upon the particular insurer or insurers involved.

The settled proposition that an agency has the option of setting standards either pursuant to the rulemaking provisions of the APA or on a case-by-case basis was reiterated in *Michigan Life Ins Co v Insurance Comm'r*, 120 Mich App 552; 328 NW2d 82 (1982). In *Michigan Life* the company had offered mortgage disability insurance to everyone, charging a uniform rate, regardless of occupational risk. Later, the company decided to issue no new policies for persons employed in more hazardous occupations. The Insurance Commission found that the company had engaged in an unfair trade practice by refusing to offer insurance to the more hazardous work classifications. The company obtained administrative review from the circuit court, which reversed the Commissioner's findings. On appeal, the company argued that the circuit court properly refused to apply the Commissioner's interpretation of the code since due process required that the agency give notice of its interpretation before holding the industry to it. However, the Court of Appeals, 20 Mich App at 563, held to the contrary:

> . . . promulgation of rules is not necessarily required before enforcement of a statute. An agency may announce new principles through adjudicative proceedings without violating the tenets of due process. *DAIIE v Commr of Ins, supra.* See, also, *National Labor Relations Bd v Bell Aerospace Co Div of Textron, Inc*, 416 US 267, 292-294; 94 S Ct 1757; 40 L Ed 2d 134 (1974); *Securities & Exchange Comm v Chenery Corp*, 332 US 194, 202-203; 67 S Ct 1575; 91 L Ed 1995 (1947).

Since precedent at both the federal and state level establishes that an agency may announce new policy or principles by order or rule and because Appellants have failed to cite

any section of the Commission's enabling statutes that mandate that the Commission may only establish the challenged Code of Conduct through formal rule promulgation, their challenge should be rejected by this Court.[3]

Appellants cite the *Detroit Base Coalition for Human Rights of Handicapped v Department of Social Services*, 431 Mich 172; 428 NW2d 335 (1988) for the proposition that any agency pronouncement of general policy, absent full compliance with the rulemaking provisions of the APA is without legal authority or effect under Michigan Law. In his treatise, Michigan Administrative Law, Section 4:15, Professor LeDuc criticizes the use of *Detroit Based Coalition, supra* as support to restrain an agency's use of pronouncements outside the rulemaking process, saying:

> *Detroit Base Coalition for Human Rights of Handicapped v. Department of Social Services* is really not supportive of the notion that agencies cannot use pronouncements as if they were rules, because that is not really what is addressed....The Court in the case also read *Michigan Farm Bureau v. Bureau of Workmen's Compensation* as standing for the simple proposition that the interpretive statement exemption in the Administrative Procedures Acts definition of rule was to be narrowly construed. It then stated that this "construction follows from the principle that the preferred method of policy making is by promulgation of rules." For this remarkable and potentially widely applicable position it cited a New Jersey state court case. Surprisingly, it ignored the leading United States Supreme Court cases which have held that the preferred method of policymaking is to be determined "in the informed discretion" of administrative agencies. This statement goes far beyond the requirements for determination of the case in which it was made.
>
> Another weakness of *Coalition for Human Rights* is that it fails to adequately reflect that this is a procedural rule, rather than a substantive rule. It dealt not with the public's right to welfare payments but to the procedures for determining that right. The Court referred to this as an example of a situation

[3] The language of Section 10a(4) is silent on the method the MPSC has to use to establish the Code of Conduct. If the Legislature had intended to limit the methods available it would have done so, as it did in other sections of Act 141. See: Section 10a(1) "... shall issue orders establishing ....", Section 10a(2) "... shall issue orders establishing ...", Section 10a(3) "... shall issue orders to ensure ...". If the Legislature had intended to limit the MPSC to the APA rulemaking requirements it would have done so. The Legislature left the method for establishing the Code of Conduct to the discretion of the Commission. That decision is not surprising in light of the 180-day deadline imposed on the Commission by the Legislature.

where the legislative branch has delegated the authority to make public policy, which in turn required the rulemaking process. Again the generality is true, but unnecessary to the consideration of the issue in the case, which involved procedure rather than substance.

The decision accurately concluded that the policy was not merely an interpretation of an existing rule, but instead an alteration of the rule affecting the procedures available to the public. Therefore the policy was either a procedurally invalid amendment of the rule or it simply had no effect....

* * *

The *Coalition for Human Rights* decision also addressed the permissive statutory power exemption from the definition of rule found in Section 7(j): "a decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." The Court stated that "[t]he situations in which courts have recognized decisions of the DSS as being within the Sec. 7(j) exception are those in which explicit or implicit authorization for the actions in question has been found." Two cases were cited as examples of the appropriate invocation of this exemption. *Colombini v. Department of Social Services* found authority for an agency action establishing a client reporting system in an underlying statute: "if an agency policy follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption." *Hinderer v. Department of Social Services* applied the same exception to a budgeting system adopted by the agency:

> "As noted in *Village of Wolverine Lake v. State Boundary Commission,* 79 Mich App 56, 59; 261 NW2d 206 (1977), if an agency policy (here LBS) follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption. Accord, *Colombini v. Department of Social Services*, 93 Mich App 157; 286 NW2d 77 (1979). We find the necessary statutory authority to be contained...[in the statute] to empower the defendant to adopt, for purposes of dispersal of AFDC benefit payments, a budgetary method of the director's own choosing, so long as it comports with Federal statutes and regulations."

* * *

Coalition for Human Rights is really a simple case of applying the APA definition to a procedural rule....The policy statement in questions in Coalition for Human Rights went well beyond interpretation of the prior rule, since it substantially changed the rule. The permissive statutory power exemption argument is simply inapplicable. If the agency had published no procedural rule governing this activity, this exemption might have come into play. What the case does is place the Michigan Farm Bureau approach in some doubt – through both the inclusion of language unnecessary to the result in the case and the exclusion of a consideration of relevant cases and policies – by making a significant judicial pronouncement – that policymaking through rules is preferred. It also fails to recognize the difference between procedural and substantive rules, a flaw not fatal to this decision, but which may cause difficulties in the cases to follow.

In contrast to *Coalition for Human Rights*, in the instant case, there is no statutory provision that mandates that the Commission promulgate the Code of Conduct as rules. The Commission has, in its informed discretion, elected to announce a new policy by order. The Court of Appeals correctly concluded that implementation of the Code of Conduct was outside the rulemaking procedures of the APA. In *Detroit Edison Co v MPSC,* 261 Mich App 1, 10-11; 680 NW2d 512 (2004), *lv granted* 688 NW2d 510 (2004), the court held:

> In Michigan, the preferred method of agency policymaking is by the promulgation of rules. *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1988). The APA defines a "rule" as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency . . . ." MCL 24.207. The APA incorporates several exceptions to the definition of a rule, including a "determination, decision, or order in a contested case," MCL 24.207(f), and a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected," MCL 24.207(j).

Here, the code of conduct is not a rule because it was implemented via orders entered in a contested case. The Court of Appeals did not err when it held that the adoption of the Code of Conduct was not subject to the rulemaking requirements of the APA.

B. The Commission's Orders establishing a Code of Conduct represent an exercise of permissive statutory power.

MCL 24.207 sets forth the definition of a rule:

> "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission thereof, but does not include any of the following:
>
> * * *
>
> (j) a decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

In this case, MCL 460.10a(4) explicitly authorizes the Commission to establish a code of

conduct. Because the code of conduct is an exercise of permissive statutory power, it is exempted from formal adoption and promulgation under the APA. See, *Michigan Trucking Ass'n v Michigan Public Service Comm,* 225 Mich App 424, 429-430; 571 NW2d 734 (1997); *Pyke v Dep't of Social Services,* 182 Mich App 619, 630-631; 453 NW2d 274 (1990); *Hinderer v Dep't of Social Services,* 95 Mich App 716, 724-727; 291 NW2d 672 (1980); *Colombini v Director, Dep't of Social Services,* 93 Mich App 157, 164-165; 286 NW2d 77 (1979).

Michigan Trucking Ass'n, supra, is instructive. In that case, MCL 479.43 directly authorized the MPSC, either by rule or order, to implement a safety rating system. The court found this was clearly a grant of permissive statutory power, adding [225 Mich App at 430]:

> In addition, it is reasonable to assume that any safety rating system would be hotly contested by the regulated carriers and that subjecting the safety rating system to the formal hearing and promulgation requirements of the APA would make it impossible for the PSC to have the system in place within twelve months, the time frame prescribed by the statute. "In construing a statute, ... unreasonable results are to be avoided wherever possible." *In re Telecommunications Tariffs,* 210 Mich App 533, 541; 534 NW2d 194 (1995). Accordingly, we conclude that the order is valid because it falls within the exception contained in MCL 24.207(j); MSA 3.560(107)(j).

Like *Michigan Trucking Ass'n,* the Commission had a limited time within which to establish a Code of Conduct. Indeed, the time afforded to the Commission here is half of that in *Michigan Trucking Ass'n.* Moreover, as the record in this case clearly demonstrates, the Code of Conduct is a hotly contested matter. As was the case in *Michigan Trucking*, subjecting the Code of Conduct to the formal hearing and promulgation requirements of the APA would make it impossible for the Commission to have the Code of Conduct in place within 180 days, the time frame prescribed by the statute. Consequently, the Commission's decision to establish the Code of Conduct by order rather than by rule was an appropriate exercise of permissive statutory authority.

In *Hinderer*, the Court of Appeals, 95 Mich App at 726-727, rejected the argument made

by Appellants in the present case that absence of wording in § 10a(4) expressly authorizing the Commission to establish the Code of Conduct by order prohibits construing § 10a(4) as a grant of permissive statutory authority:

> However, we are persuaded that subsection (j) of MCL 24.207 provides an exception to the rulemaking edict of the APA which is applicable to the facts of the case sub judice. We find the administration of the AFDC program and the use of LBS thereunder to be tantamount to the exercise *vel non* of a permissive statutory power. As noted in Village of *Wolverine Lake v State Boundary Comm*, 79 Mich App 56, 59; 261 NW2d 206 (1977), if an agency policy (here LBS) follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption. Accord, *Colombini v Director, Dep't of Social Services*, 93 Mich App 157; 286 NW2d 77 (1979). We find necessary statutory authority to be contained in MCL 400.14(1)(b); MSA 16.414(1)(b), as we read **it to empower the defendant to adopt, for purposes of dispersal of AFDC benefit payments, a budgetary method of the director's own choosing**, so long as it comports with Federal statutes and regulations. We have already concluded that LBS surmounts this Federal obstacle. (Emphasis added; footnote omitted).

The Commission under § 10a(4) had permissive statutory power to adopt, through a method of its own choosing, a Code of Conduct. Thus, unlike the other subsections in § 10a where the Legislature specified the exact method by which certain acts were to be accomplished (see footnote 4), subsection (4) of § 10a contains no such limitation. Thus, like *Hinderer,* and consistent with MCL 24.207(j), the Commission had the discretion to choose the method by which a Code of Conduct was established.

C. The Commission's Code of Conduct Orders are not contrary to the Court of Appeals decision in *In Re Public Service Commission Guidelines for Transactions between Affiliates.*

Appellants argue that the Code of Conduct adopted by the Commission in Case No. U-12134 is unacceptable and unlawful because guidelines adopted by the Commission in another administrative proceeding were vacated by the Court of Appeals in *In Re Public Service Commission Guidelines for Transactions between Affiliates*, 252 Mich App 254; 652 NW2d 1 (2002). In that decision, the Court of Appeals held that the process used by the Commission in

that case was contrary to established APA procedures. There are significant differences, however, between that case and this one. First, the Code of Conduct has been expressly mandated by the Michigan Legislature in MCL 460.10a(4). In contrast, the guidelines adopted by the Commission that were vacated in *In Re Public Service Commission Guidelines, supra,* were undertaken upon the Commission's own motion and entirely at the Commission's discretion. Here, the Commission had no discretion on whether to establish a Code of Conduct. The Legislature commanded the Commission to establish a Code of Conduct. Second, unlike the situation in *In Re Public Service Commission Guidelines, supra*, the Commission was given a limited time to establish the Code of Conduct. One hundred and eighty days to be exact. As previously noted, the amount of time afforded by the Legislature simply would not be enough time for the Commission to promulgate rules in accordance with the APA. Third, in its statutory mandate to the Commission, the Legislature specifically prescribed the type of measures that should be incorporated into a Code of Conduct, such as preventing cross-subsidization or information sharing. Lastly, had the Legislature wanted to require the Commission to promulgate rules to prevent such conduct, it could have done so.

D. In an amendment to § 10a, adopted subsequent to the Court of Appeals decision issued in this case, the Legislature ratified the method used by the Commission to establish the Code of Conduct and the content of the Code.

Unhappy with the Code of Conduct adopted by the Commission, Appellants approached the Legislature seeking to have the Code of Conduct section (460.10a(4)) modified. The Appellants were partially successful.[4]

[4] 2003 PA 214, (imd eff December 2, 2003), MCL 460.10a(5) directed the Commission to extend temporary waivers it had granted to utilities operating appliance service plans. In this amendment the Legislature indicated that the amendment should not prejudice the appeals pending before the Court of Appeals.

After the Court of Appeals issued its decision on March 2, 2004, the Legislature again amended Section 10a, 2004 PA 88, (imd eff April 22, 2004). The amendment [MCL 460.10a(5)] provided in pertinent part:

> (4) No later than December 2, 2000, the Commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10cc.
>
> (5) An electric utility may offer its customers an appliance service program. **Except as otherwise provided by this section the utility shall comply with the Code of Conduct established by the Commission under subsection (4).** (Emphasis added).

The Legislature is presumed to have knowledge of administrative agency decisions and court decisions that have interpreted statutes it has enacted. *Smith v Smith*, 433 Mich 606; 447 NW2d 715 (1989); *General Motors Corp. v Eves*, 395 Mich 604, 637; 236 NW2d 432 (1975); *Melia v Employment Security Commission*, 364 Mich 544, 568; 78 NW2d 273 (1956); *Chrysler Corp. v Smith*, 297 Mich 438, 452; NW 298 (1941); *Consumers Power Company, v Dept. of Treasury*, 235 Mich App 380, 388; 597 NW2d 274 (1999); *Alexander v Liquor Control Commission*, 35 Mich App 686, 688; 192 NW2d 505 (1971).

The effect of a re-enactment of statutory language that has been subject to judicial interpretation was addressed by Justice Boyle in her concurring opinion in *Smith, supra,* 433 Mich at 636:

> Thus, it is a well-established rule of statutory construction that when the Legislature, with this presumed knowledge of prior judicial interpretation, reenacts a statute or provision in substantially the same form as that interpreted, it is deemed to have adopted the interpretation into the language of the statute or provision.

The effect of re-enactment of statutory language that has been subject to interpretation by an

administrative agency was addressed by this Court in *Melia, supra,* 364 Mich at 565:

> The executive interpretation given a law by officials charged with its administration must be presumed to have been known to the legislature so that such construction would be carried with it and sanctioned when the legislature amends the statute and reenacts the language so construed.

In this case we have the administrative agency's interpretation of § 10a(4) and a judicial interpretation of § 10a(4), which affirmed the administrative agency's interpretation. The Court of Appeals in *Alexander, supra*, 35 Mich App at 688, held that in such an instance:

> It must be presumed that the Legislature was aware of the administrative and judicial interpretation of this provision and that the re-enactment of the language so construed carries with it legislative approval of such construction. *Chrysler Corp. v Smith* (1941), 297 Mich 438, 452.

Given the history of this case there is no doubt the Legislature had actual knowledge of the utilities' dissatisfaction with the manner in which the Commission established the Code of Conduct and the content of the Code of Conduct, and that the Court of Appeals had affirmed the Commission's interpretation. Responding to the utilities' dissatisfaction the Legislature addressed one area of utility discontent (appliance service program), but in all other regards expressly ratified the Code of Conduct adopted by the Commission. Notably, the amending language adopted subsequent to the Court of Appeals decision did not include any language to limit the prejudicial effect the amendment might have on pending litigation.[5]

The language used by the Legislature in 2004 PA 88 sent a clear message. With the exception of the treatment of utility appliance service plans, the Legislature was satisfied with the method used to establish the Code of Conduct and its content. [6] If the Legislature had intended to require the Commission to establish the Code of Conduct pursuant to the rulemaking

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[5] The language used in 2004 PA 88 to amend Section 10a(4) simply replaced the 180-day reference with a specific date (December 2, 2000). In all other respects, the Legislature re-enacted the language of § 10a(4). .

[6] Appellants filed Applications for Leave to Appeal with this Court on April 13, 2004, prior to the date the Legislature amended § 10a.

provisions of the APA it could have done so. It did not. Instead, the Legislature expressly required utilities to comply with the Code of Conduct adopted by the Commission. The Legislature, by adopting 204 PA 88, sanctioned the interpretation given to Section 10a(4) by the Commission and the Court of Appeals. This Court should not substitute its judgment for that of the Legislature.

E. MECA's reliance on *Metromedia, Inc. v Taxation Div.*, 97 NJ 313; 478 A2d 742 (1984) and *Delmarva Power & Light Co v Public Service Comm of Maryland*, 370 Md 1; 803 A2d 460 (2002) is misplaced.

MECA has cited *Metromedia, supra* and *Delmarva, supra*, to support their claim that the Code of Conduct established by the MPSC must be promulgated pursuant to the rulemaking requirements of the APA. MECA's presentation ignores important factors that distinguish *Metromedia* and *Delamarva* from this case.

In *Metromedia*, 478 A2d at 753, the Court noted that "... the determination [made by the Director of the New Jersey Tax Division] was not otherwise expressly provided for by the statute, nor was it clearly and obviously implied." In this case the Legislature expressly directed the Commission to establish a Code of Conduct, including direction as to what elements the Code of Conduct should contain. The Michigan APA, in contrast to its New Jersey counterpart excludes an exercise of permissive statutory authority from the definition of a rule. MCL 24.207(j). The Commission adopted the Code of Conduct at the express direction of the Legislature, MCL 460.10a(4). The Legislature left the manner in which the Code would be adopted to the discretion of the Commission. The Commission exercised the permissive statutory authority granted to it by the Legislature to establish the Code of Conduct through a contested case proceeding. A determination, decision or order in a contested case is specifically excluded from the APA definition of a rule. MCL 460.207(f). Unlike the *Metromedia* case, the action by the Commission to adopt the Code of Conduct in this case is authorized by the

Michigan APA.

Although the *Delmarva* case at first glance appears to support MECA's position, such a contention ignores two important distinguishing facts. The Maryland APA, MD State Gov Code Ann. 10-101, does not include the "exercise of permissive statutory authority" exception, MCL 460.207(j), or the "contested case proceeding" exception, MCL 460.207(f) from the definition of a rule that is contained in the APA. Consequently, *Delmarva*, is not applicable.

A final factor which distinguishes both *Metromedia* and *Delmarva* from this case is the subsequent ratification by the Legislature of the manner in which the Code of Conduct was adopted, and its content. (See Argument I, D, at pages 19-21 of this brief).

F. Arguments made by Edison and Consumers which are beyond the scope of the grant of leave should be ignored.

This Court granted leave on a limited issue: "whether the December, 2000 and October, 2001 Orders of the Michigan Public Service Commission are unlawful because they were not promulgated in conformity with the rulemaking provisions of the Administrative Procedures Act, MCL 24.201 *et seq.*"[7] At pages 19-23 of Edison's brief, the company raises concerns it has over the scope of the Code of Conduct adopted by the MPSC. Even though Edison acknowledges in its brief that this Court "granted leave to appeal on the rulemaking issue only",[8] it attempts to address alleged deficiencies in the substantive content of the Code of Conduct and alleged procedural deficiencies in the contested case proceeding conducted by the Commission. Edison's Application for Leave to Appeal raised these same issues, but this Court did not grant leave. That attempt to expand this Court's grant of leave is improper. MCR 7.302((G)(4)(a).

[7] Order Granting Leave to Appeal dated November 5, 2004.

[8] Edison Brief, p. 20.

Consequently, the Commission has limited its arguments to the issue this Court has directed the parties to address, and will not address these claims.[9]

Similarly, Consumers at pages 21-25 raises objections it has to the scope and content of the Code of Conduct, including Commission orders issued subsequent to the December 2000 and October 2001 Orders that are not the subject of this appeal.[10] These claims are clearly outside the scope of this Court's grant of leave, and the Commission will not address these claims.[11]

Conclusion

The orders issued by the Commission establishing a Code of Conduct do not violate the APA. The statute and case precedent establish that an agency may develop policy by rule or order. *National Labor Relations Board, supra; Northern Michigan Exploration, supra.* The Legislature, through the adoption of § 10a(4) of Act 141, directed the Commission to expeditiously establish a Code of Conduct within 180 days of Act 141's enactment. The Legislature did not specify the method the Commission should use to establish the Code. MCL 460.10a(4). The Commission elected to use a contested case proceeding to develop and establish the Code, MCL 24.207(f). The Commission's orders establishing the Code represent an exercise of permissive statutory power, MCL 24.207(j), and as such are excluded from the rulemaking requirements of the APA. *Michigan Trucking Ass'n, supra.*

The Court of Appeals decision in *In Re Public Service Commission Guidelines, supra*, is inapposite because the Code of Conduct was established at the express direction of the Legislature. In this case the Commission had explicit statutory authority to establish a Code of

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[9] The Commission notes that with the exception of the treatment of appliance service programs, the Legislature ratified the scope and content of the Code of Conduct with the enactment of 2004 PA 88, imd eff April 22, 2004, MCL 460.10a(4),(5).

[10] Applications for Leave to Appeal those orders are pending before the Court in Docket Nos. 127094/127099/127473.

[11] See footnote 10.

Conduct. The Commission was not acting on its own motion and at its discretion, as was the case in the *Guidelines* case.

The Legislature's subsequent adoption of 2004 PA 88, ratified the interpretation given to §10a(4) by the Court of Appeals and by the Commission. *Chrysler Corp., supra; Alexander, supra.* This Court should not substitute its judgment for that of the Legislature, and should affirm the decision of the Court of Appeals.

Relief

The Michigan Public Service Commission respectfully requests that this Court affirm the Court of Appeals decision and the Commission's December 4, 2000 and October 29, 2001 orders.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

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Dated: February 7, 2005

STATE OF MICHIGAN
IN THE SUPREME COURT

THE DETROIT EDISON COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.
_____/

Docket No. **125950**

(Court of Appeals No. 237872)

(MPSC Case No. U-12134)

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Pamela A. Walters, being first duly sworn, deposes and says that on February 7, 2005, she served a true copy of the Brief on Appeal of Appellee Michigan Public Service Commission upon the following parties by depositing the same in a United States postal depository enclosed in an envelope bearing postage fully prepaid, plainly addressed as follows:

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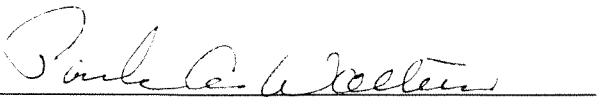

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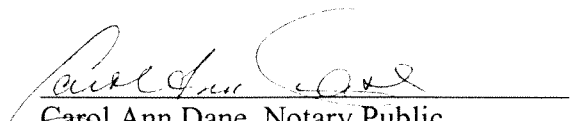
Subscribed and sworn to before me this 7th day of February, 2005.



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